United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74 1214

to be argued by
ROY M. COHN

In The

UNITED STATES COURT OF APPEALS

for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANCORP NATIONAL SERVICES, INC.,

Appellant.

On Appeal from Judgment of the United States
District Court for the Southern District
of New York

BRIEF FOR APPELLANT

SAXE, BACON, BOLAN & MANLEY
Attorneys for Appellant
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
Of Counsel

TABLE OF CONTENTS

Page

Issues Presented..... 2

Preliminary Statement..... 3

Modified Order to Cease and Desist..... 4

Statement of Facts..... 6

Argument:

Point:

I. The action was premature in that the Government failed to comply with the requisite statutory procedure prior to the institution of this suit..... 8

II. The final cease and desist order did not apply to newspapers..... 12

III. The payments made to the appellant were continuations of historic discounts rather than display or promotion payments and were in recognition of the services provided by the appellant..... 18

IV. The appellant did attempt to comply with the cease and desist order and succeeded in light of the fact that it had no true competitors..... 29

V. The fines imposed upon the appellant were without any foundation whatsoever in the record, thus requiring, at a minimum, a remand on this phase..... 35

Conclusion..... 44

TABLE OF CITATIONS

Page

American News Company v. Federal Trade Commission, 300 F.2d 104 (2nd Cir., 1962)..... 10, 12, 35

Bauer v. Acheson, 106 F.Supp. 445 (D.C.D.C., 1952)..... 9

Bowles v. May Hardwood Company, 140 F.2d 914 (6th C.C.A., 1944)..... 15

Buttny v. Smiley, 281 F.Supp. 280 (D.C.Col., 1968)..... 9

Continental Baking Co. v. Dixon, 283 F.Supp. 287 (D.C.Del., 1968)..... 10, 11

Fecter v. Federal Trade Commission, 201 F.2d 790 (9th Cir., 1953)..... 17

Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46 (1965)..... 10

Federal Trade Commission v. National Lead Company, 352 U.S. 419 (1957)..... 13

Ford Motor Co. v. Federal Trade Commission, 120 F.2d 175 (6th C.C.A., 1941)..... 13

Grand Union v. Federal Trade Commission, 300 F.2d 92 (2nd Cir., 1962)..... 12

Herbold Laboratories v. United States, 413 F.2d 342 (9th Cir., 1969)..... 41

National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 (1941)..... 14

Quaker Oats Co., In the Matter of, 60 F.T.C. 798 (1962)..... 14

R.H. Macy and Co. v. Federal Trade Commission, 326 F.2d 445 (2nd Cir., 1964)..... 12

Swanee Paper Co. v. Federal Trade Commission, 291 F.2d 833 (2nd Cir., 1961)..... 12

United States v. American Greetings Corp., 168 F.Supp. 45 (N.D.Ohio, E.D., 1958)..... 38

United States v. Beatrice Foods, 351 F.Supp. 969 (D.C. Minn., 1972)..... 38

United States v. Bostic, 336 F.Supp. 1312 (D.C.S.C., 1971).. 41

United States v. H.M. Prince Textiles, Inc., 262 F.Supp. 383 (S.D.N.Y., 1967)..... 38, 40

United States v. J.B. Williams Co., Inc., 354 F.Supp. 521 (D.C.N.Y., 1973)..... 38

United States v. St. Regis Paper Co., 355 F.2d 688 (2nd Cir., 1966)..... 8, 9, 10, 11

United States v. Vitasafe Corp., 212 F.Supp. 397 (S.D.N.Y., 1962)..... 38, 39

Title 15, United States Code:
Section 13(d)..... 21, 41
Section 45(1)..... 9, 10, 40
Section 56..... 8, 9, 40

Other Sources
Black's Law Dictionary, 4th Ed. (1968)..... 32

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANCORP NATIONAL SERVICES, INC.,

Appellant.

On Appeal From Judgment of the United States District Court For The Southern District of New York

---

BRIEF FOR APPELLANTS

ISSUES PRESENTED

1. Whether the action instituted by the Government was premature in that it had failed to comply with the requisite statutory procedure under 15 U.S.C. sec. 56 prior to the institution of this suit.

2. Whether the final cease and desist order of the Federal Trade Commission was intended to apply to newspapers which are the sole predicate of this action.

3. Whether the payments made to the appellant were continuations of historic discounts and in realization of the benefits provided by the appellant, rather than display or promotion payments.

4. Whether the appellant did attempt to comply with the order and succeeded in doing so in light of the fact that it had no true competitors.

5. Whether the fines imposed upon the appellant were without any foundation whatsoever in the record, thus requiring, at a minimum, a remand on this phase.

PRELIMINARY STATEMENT

This is an appeal from a judgment entered in the United States District Court, Southern District of New York, by the Honorable Dudley B. Bonsal and from the trial court's order denying appellant's motion to dismiss or stay the action pending a hearing and final determination by the Federal Trade Commission on the issue of violation of its cease and desist order.

The complaint charged violation of an existing decree of the Commission, and contained three counts referring to dealings between the appellant and certain newspapers, requesting relief in the form of civil penalties of $585,000 plus costs and an injunction against further violations of the order.

The appellant was convicted of one hundred twenty-two violations of the order and fined $204,200 plus costs, and permanently enjoined from further violating the order.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on January 10, 1961; and the court on February 7, 1962, having filed its decision, and on April 27, 1962, having entered its final decree modifying and as modified, affirming and enforcing said order to cease and desist; and the United States Supreme Court having denied a petition for certiorari filed by respondents;

NOW, THEREFORE, IT IS HEREBY ORDERED that the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the final decree of the Court of Appeals, to read as follows:

IT IS ORDERED that the respondents, The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

> Receiving or inducing and receiving, on contracting for the receipt of anything of value from any of their suppliers as compensation or in consideration for any display or promotional services or facilities furnished by or through respondents in connection with the

processing, handling, sale or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionately equally terms to all their other customers competing with respondents in the sale and distribution of such suppliers' products.

By the Commission.

Joseph W. Shea,

Secretary

ISSUED: April 13, 1964

STATEMENT OF FACTS

The appellant, Ancorp National Services, Inc., formerly the American News Company, is a Delaware corporation with its principal office and place of business at 477 Madison Avenue, New York, New York. The Union News Division of the appellant was formerly a wholly-owned subsidiary of American News which was merged into it in 1959.

The Union News Division operates a large number of newsstands which are located primarily at railroad, airport, bus and subway terminals and in the lobbies of major hotels and office buildings in New York City and throughout the United States at what constitute high consumer traffic locations. Pre-Trial Order, 97a-98a.*

The appellant's operations involve union wages and are covered by leases which require substantial investments in specially designed newsstands, high rentals (which rise with increases in the sales price of an item), extra hours, and holiday and weekend man power costs.

The Federal Trade Commission issued its complaint on February 5, 1959, charging the American News Company and the Union News Company with having violated section 2(d) of the Clayton Act (15 U.S.C. sec. 13(d)) with respect to payments or allowances received from publishers of magazines, pocketbooks and comic books, and attempting to receive the same from cigar suppliers. The Examiner's findings related solely to these specified items. The Federal Trade Commission made no charge either directly or indirectly with respect to newspapers and entertained no

---

* References are to pages in the Appendix. References to exhibits are as follows: "GX" refers to Government's trial exhibits and "DX" to Defendant's trial exhibits. References to Trial Transcript are denoted as "T., (pages)" of the Appendix.

evidence whatever concerning newspapers. Pre-Trial Order, 99a.

Since at least 1943, the appellant has been receiving payments from various newspaper publishers, the amounts of which have occasionally increased, and the form of which has changed from a variable amount dependent on sales to a fixed amount approximating the variable amount at the time of the alteration.

The appellee contends that these payments are covered by the cease and desist order and that they constitute a violation thereof.

I. THE ACTION WAS PREMATURE IN THAT THE GOVERNMENT FAILED TO COMPLY WITH THE REQUISITE STATUTORY PROCEDURE PRIOR TO THE INSTITUTION OF THIS SUIT

Prior to the United States being authorized to bring suit against a party for violation of a final cease and desist order of the Federal Trade Commission, it is incumbent upon the Attorney General to first receive official certification of the alleged violation from the Federal Trade Commission. 15 U.S.C. sec. 56. Despite this clear mandate, there is no conclusive evidence in the trial transcript nor in the papers of the Joint Appendix to indicate absolutely that this procedure has been followed. The only reference to this certification is a bold assertion of this fact in the complaint and in the government's Answering Affidavit to the appellant's motion to dismiss. This certainly does not comply with the clearly mandatory procedure of 15 U.S.C. sec. 56:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

This procedure for instituting a suit for violation of a cease and desist order of the Federal Trade Commission has been held to be mandatory, and without compliance with this form, no action may be maintained. United States v. St. Regis Paper Company, 355 F.2d 688, (2nd Cir., 1966).

It is essential to the requirements of justice that each case be conducted in a procedurally proper manner. This method is not stationary or set, but must be determined in light of the specific facts applicable to the individual case. Only through such conduct can the constitutional requirements of "due process" be satisfied. "The particular procedure to be adopted may vary as appropriate to a disposition of the issues affecting interests widely varying in kind." Bauer v. Acheson, 106 F.Supp. 445, 451 (D.C.D.C., 1952). It is appellant's contention that the United States has not complied with the procedural requirements for prosecution under 15 U.S.C. sec. 45(1) and 15 U.S.C. sec. 56.

In light of the Government's failure to come forth with proof of the appropriate certification, this action was clearly untimely and procedurally defective. The "(t)est of whether or not one has been afforded procedural due process is one of fundamental fairness in light of total circumstances." Buttny v. Smiley, 281 F.Supp. 280, 288 (D.C.Col., 1968). Viewed from the perspective of what is mandated by 15 U.S.C. sec. 56 and United States v. St. Regis Paper Company, supra, the Government has failed to provide the appellant with due process in light of the mandatory procedure which should have been followed. This civil action for penalties is therefore undoubtedly improper and should not have been entertained by the District Court.

There can be no assertion by the Government that it is the proper party to institute a suit of this nature. "The Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the act. Federal Trade Commission

v. Colgate-Palmolive Co., 380 U.S. 374, 285, 85 S.Ct. 1035, 13 L.Ed. 2d 904." Federal Trade Commission v. Mary Carter Paint Company, 382 U.S. 46,48, 86 S.Ct. 219, 15 L.Ed. 2d 128, 130 (1965). Thus, the Supreme Court has expressed the opinion that the Commission is the proper body to initially determine whether or not its order has been violated. "The fact that the FTC has the exclusive power and expertise to formulate policy in its efforts to maintain competition and regulate unfair business practices commands the conclusion that Congress intended it to have the exclusive power to implement that policy by initiating civil penalty suits under Section 5 (1) (of the Federal Trade Commission Act, 15 U.S.C. sec. 45(1))." United States v. St. Regis Paper Company, supra, at 694. There is direct authority for appellant's claim that the Government's action constituted a denial of due process: "(T)he Commission has the obligation to determine and to inform the parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. sec. 45(1) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process." Continental Baking Company v. Dixon, 283 F.Supp. 287, 288 (D.C.Del., 1968). Without this initial finding and a subsequent official certification by the Commission, there is no authority for the maintenance of a penalty suit by the Attorney General.

The final order of the Federal Trade Commission, as modified by the Court of Appeals (American News Company v. Federal Trade Commission, 300 F.2d 104 (2nd Cir., 1962)) did not mention newspapers.

More specifically, this Court, in amending the Commission's order, deleted the reference to newspapers in the Commission's initial order. After this litigation, the Commission's next involvement was a hearing which commenced on September 23, 1969. It is only from the conclusion of this hearing that penalties can be assessed according to Continental Baking Co. v. Dixon, supra. This admonition from the Delaware District Court should be seriously considered in light of the variances which clearly exist between the subject matter of the initial Commission hearing and determination and the newspapers involved in the instant case. Not only should penalties be assessed from the aforementioned date, but there has also been no proof of the requisite certification of any violation. As stated above, the Supreme Court has found that the Commission is in the best position to determine whether or not one of its orders has been violated. Clearly the proper procedure which should have been followed would have been a full-scale hearing before the Commission, a determination by the Commission that the appellant's acts as to newspapers constituted a violation of the order, official certification of the alleged violation to the Attorney General, and only then, the institution of whatever action he might deem necessary. Even assuming this procedure was strictly followed as required by law (United States v. St. Regis Paper Company, supra), penalties should only be assessed from the date of a determination by the Commission that the appellant's acts as to newspapers did in fact constitute a violation of its order.

II. THE FINAL CEASE AND DESIST ORDER DID NOT APPLY TO NEWSPAPERS

The final order of the Commission, as modified pursuant to the directive of the Court of Appeals, does not apply to the issue of newspapers raised in the Government's complaint. The original Federal Trade Commission complaint only referred to magazines, pocket books, comic books and cigars. The hearings and the Examiner's findings related solely to these items and the Commission itself deleted the charges relating to cigars. No charge was ever levied with respect to newspapers in the Federal Trade Commission hearing and no evidence was ever offered relating to them. Pre-Trial Order, 98a-99a.

While a liberal construction should be given to the cease and desist orders of the Commission, this does not imply that the factual basis for the order can be ignored when considering whether or not a party is in violation of such an order. See American News Company v. Federal Trade Commission, supra, Grand Union v. Federal Trade Commission, 300 F.2d 92 (2nd Cir., 1962), Swannee Paper Company v. Federal Trade Commission, 291 F.2d 833, 837 (2nd Cir. 1961), R.H. Macy & Company v. Federal Trade Commission, 326 F.2d 445, 450 (2nd Cir., 1964). This rule of liberal construction refers not to the subject matter controlled by the order, but rather to the practice it is intended to correct. Thus, a liberal construction should be placed on the order as to appellant's practices vis a vis comic books, pocket books and magazines, but not as to newspapers which are the subject of the instant suit. The Federal Trade Commission had no interest in appellant's newspaper activities when it instituted its action in 1959 and the hearings in no way involved newspapers.

Had the Federal Trade Commission intended its order to apply to all of the appellant's business commodities, why did the Commission take pains to amend its order so as to exclude reference to tobacco products? Clearly, the only logical conclusion that can be reached upon viewing this action is that it was the Commission's intention that the final order only apply to the three specific areas hereinbefore mentioned. Federal Trade Commission orders must be construed in light of the allegation contained in the complaint and the findings of the Commission. Federal Trade Commission v. National Lead Company, 352 U.S. 419 (1957). Had the intent been that which the Government now claims, there would have been little point in excluding tobacco products or in including any particular product as the order would have then been all-inclusive. However, the true nature of the decision and the applicable law clearly shows that such a contention is erroneous.

The payments in question had continued for several years prior to 1959 and the Federal Trade Commission, due to its extensive investigation of appellant's business at that time, was surely aware of their existence. This being so, it is more than a little strange that neither the hearing nor the final order dealt in any way with these discount payments being received from the newspapers. Had there been an intention to deal with newspapers in the final order, there would have been at least some discussion relating to them at the hearing. "Cease and desist orders of the Commission should go no further than reasonably necessary to correct the evil complained of and preserve the rights of competitors and the public...." Ford Motor Company v. Federal Trade Commission, 120

F.2d 175, 183 (6th C.C.A., 1941), cert. den., 314 U.S. 668, 62 S.Ct. 130, 86 L.Ed. 535. The evil complained of in the 1959 complaint and the subsequent hearings, as previously mentioned, did not involve newspapers. "The legality of an order cannot rest solely on its 'effectiveness.' Nor can the Commission center an order merely on the basis of a possibility or even likelihood, that future violations of law may occur. It must first find that a statute it administers has been violated. Then the Commission must relate its order to its findings, by proscribing only 'future violations identical with, or like or related to' the violation found. Federal Trade Commission v. Henry Broch Company, decided by the Supreme Court, January 15, 1962 (368 U.S. 360; 7 S&D 305). The Commission's authority to restrain unlawful practices found to have been committed 'is not an authority to restrain generally all other unlawful practices which have neither found to be pursued nor persuasively to be related to the proven unlawful conduct.' National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 433 (1941)." In the Matter of the Quaker Oats Company, 60 F.T.C. 798, 818 (1962, dissent by Elman, Commissioner); see National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 (1941). The final order clearly dealt with problems that then existed, but the Government should not be now allowed to expand the order's coverage to deal with areas which the Commission apparently felt were of no interest to it.

"(T)he breadth of an administrative order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicted

because of their similarity and relation to those unlawful acts which have been found to be committed in the past." Bowles v. May Harwood, 140 F.2d 914, 916 (6th C.C.A., 1944). As clearly demonstrated in the previous proceedings of the instant case, there is a strong distinction between newspapers and the areas with which the Commission's order dealt and this fact should be strongly considered by this Court. The retail of newspapers is a very perilous operation. They are quick-moving items which must be sold in a relatively short time after delivery. The distribution and retail of these papers is a complex, yet rapid operation which is totally unrelated to the distribution and sale of comic books, paperbacks or magazines which are printed in areas outside of New York City and distributed over a much longer period of time. Returns on these items and their general handling are at a much slower pace than that of newspapers. Not only is there no question that the Commission was apparently not interested in appellant's newspaper dealings, but the very essence of the distinctions between the newspaper industry and that of books and magazines, the subject of the order, would prohibit the instant suit. These distinctions clearly reveal that there is little, if any, similarity between these two areas.

The initial decision of the Federal Trade Commission explained at length the distribution and sale of the products involved therein. A comparison between them and the newspaper industry reveals glaring dissimilarities between the items involved in the Commission's initial complaint of 1959 and newspapers.

> The evidence shows that the publishers of various magazines and other publications distributed to the public by Respondent's news-stands did not sell and deliver those publications directly to the Respondents, but employed two intermediaries in the making of such sales and deliveries. First, each publishing company employed as its agent a national distributor; and second, the national distributor employed a local wholesale distributor who delivered the publications to Respondents and their competitors. Initial Decision of the Federal Trade Commission, 45a.

The facts of the instant case are clearly in opposition to the circumstances surrounding the initial findings of the Commission, as the deliveries of the newspapers were made directly by the appellant to its stands and not through any national intermediary. Apart from this, as will be shortly demonstrated, they did not have any opposition who could realistically be termed "competitors."

The sale of magazines is a truly national operation while the retail of newspapers is a much more local concern depending upon the point of origin of the particular paper. Apart from this, the original Federal Trade Commission complaint alleged that the payment scheme was forced upon the publishers by the appellant. The origin of the original discount scheme was never shown by the Government to have been forced upon the newspapers by the appellant; actually, the origin of this scheme was never demonstrated. The initiation of the revised discount scheme, allegedly a "promotional" scheme, in the instant case was never clearly linked to the appellant, and the form of this plan came apparently not from the appellant, but rather from the newspapers, themselves. T., 423a, lines 12-18.

It could reasonably be concluded that the Commission was aware of the payments as to newspapers during the previous investigation and

hearing. Under the provisions of the Federal Trade Commission Act, unfair practices are declared unlawful, but "the breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose of the order is to prevent violations of the Act, the threat of which is indicated by the past conduct of the petitioners." Fecter v. Federal Trade Commission, 201 F.2d 790, 794 (9th Cir., 1953), cert. den., 346 U.S. 880. Clearly the past actions of the appellant, prior to 1959, as to those activities to which the order referred, were in no way related to newspapers. The appellant could reasonably have believed that the order only applied to the activities specifically mentioned in the Commission's report. Thus, this obviously reasonable conclusion coupled with the distinctions between newspapers and the subject matter of the order would strongly militate against the propriety of using this order as the basis of this suit, especially when the appellant could reasonably have concluded that its activity was not in violation of the order and obviously had obeyed the order as to its conduct in reference to magazines, comic books and newspapers. There should have been at least an initial determination by the Commission that the order was a proper vehicle to maintain this suit.

III. THE PAYMENTS MADE TO THE APPELLANT WERE CONTINUATIONS OF HISTORIC DISCOUNTS RATHER THAN DISPLAY OR PROMOTION PAYMENTS AND WERE IN RECOGNITION OF THE SERVICES PROVIDED BY THE APPELLANT.

The Federal Trade Commission order, as pointed out above, did not cover newspapers. Even assuming that it did, there is serious doubt as to whether or not the payments, which are the subject matter of the instant case, actually constituted violations of the order. Not only should the Commission have been aware of these payments in 1959, but the very longevity and inflexibility of them indicates that the purpose was clearly not promotional. Testimony at the trial indicated that even if the posters contributed to the newsstands were not universally displayed, there was no reduction in the payments to the appellant. T., 375a-376a. These newspapers are not charitable institutions, but rather profit-seeking businesses. Had the payments been intended for promotional activities which the appellant failed to completely provide, then clearly the newspapers would have refused to pay the full amount agreed upon. The record clearly indicates, however, that these payments continued to be made in their full amounts. This fact strongly suggests that the Government's contention that these payments were for "promotional" activities is highly suspect, if not absolutely erroneous.

For several years, the appellant had been receiving the equivalent of wholesale discounts, in general about 25¢ per hundred papers,

amounting to approximately $22,000 annually from The New York Times (T., 167a-168a, 240a), $25,000 from the Daily News and a minimal amount from The New York Post. In the case of The Times, an increase of $2,000 was requested to compensate for actual increases in labor costs and increased rental percentages based on increased prices, the advantages of which did not accrue to the appellant. T., 206a.

The increasing costs of the appellant's operations forced it to seek additional funds, but these were not as compensation for promotional activities. T., 282a, lines 14-23. On pages 298a-299a of the Trial Transcript, appellant's attorney, during cross-examination of Nathan Goldstein, special assistant to the publisher of The Times, read from Mr. Goldstein's deposition. The general point of this was to clearly demonstrate that the payments to the appellant were specifically for the increased expenses and were recognized as such by The Times. T., 298a, lines 9-24. Mr. Goldstein's deposition, partially reproduced in the Trial Transcript at pages 299a, line 6 - 300a, line 7, reveals that the payments were in no way linked to a promotional scheme:

> The question I asked you at the top of page 75 which is a quotation apparently my reading from the records again, line 1 of page 75:
>
> "Q. If I understand your testimony correctly you started with a total amount of money needed and you worked backwards to fit some type of dollar value, multiplied by an arbitrary number of instances, whether or not there were, in fact, 528 poster locations. Is my understanding correct in this instance?

"A. Yes, it would work back.

"Q. Work back from the total amount that they wanted from The New York Times?

"A. That they said they needed.

"Q. Is that a correct statement of the situation with respect to the derivation of the amount of the allowance?"

And I asked you on the next page, after some colloquy:

"Q. Mr. Reynold's testimony coincides with your recollection of the facts?

Does that answer "Yes" still stand?

"A. I don't see any reason to change it...."

Nowhere in this discourse is there any mention of promotional schemes or payments to the appellant as compensation for any advertising. The only connection between the payments and each individual stand was as a convenient frame of reference. However, the amount paid to the appellant was merely a set figure without any particular association to either promotional schemes or individual stands.

As previously mentioned, appellant feels that the Federal Trade Commission was aware of these payments due to its previous investigation of the appellant's activities. Appellant's rigid compliance with the order as to the areas covered by it should be considered as evidence of good faith especially in light of the time lag between the order and the instant action. No complaint has ever been lodged concerning violation of the order in the areas of the Commission's previous investigation. There is no evidence offered that what the appellant was attempting to do was, in essence, to avoid the Commission's order through another branch

of its operations. On the contrary, the record reveals that these payments originated and continued long before the Commission expressed any interest in the appellant's operations in this area. At trial, this was clearly demonstrated:

> "Q. Do you know how long this practice existed prior to 1969 of granting the Union News Company?
>
> "A. I don't know how long it lasted. It was a long tradition and it was an accepted part of the operation." T., 234a, lines 19-23.

This testimony by Ivan Veit of The Times is also supported by that of Goldstein:

> "Q. Does this memorandum accurately reflect, to the best of your recollection, the history of rebates and discounts that The Times had with the Union News Company?
>
> "A. Yes, for effective dates.
>
> "Q. The period covered by your memorandum, at least on the first page is 1950-1960." T., 234a, lines 10-16.

If, in 1950, these payments were already being made, and continued through the hearings before the Commission, it is rather odd that no mention of them was made at that time. The only logical conclusion that can be drawn from this is that the Federal Trade Commission was in no way interested in these payments and did not consider them to be in violation of section 2(d) of the Clayton Act (15 U.S.C. sec. 13(d)). It is of even greater interest that the payments from The New York Post began as far back as 1943. T., 433a, lines 12-15.

The trial, apart from revealing the long-standing payments to the appellant, also showed that even when the poster program was instituted, as the payments continued, they were merely of the same nature as the previous payments - discounts, not promotional compensation! Mr. Veit testified that the plan for payments, under the guise of a promotional scheme, was really nurtured by The Times. T., 227a, lines 15-18. Not only did the newspapers foster the program, but there is a strong indication that it originated with them. According to the testimony of Goldstein, special assistant to the publisher of The Times:

> "Q. May I interrupt you for a second and ask you, Mr. Goldstein, whether you suggested a promotional allowance?
>
> "A. According to my file memo I proceeded to recall that Mr. McCollough had mentioned a merchandising cost and I would say that I probably initiated this frame of reference." T., 413a, lines 12-18, emphasis supplied.

The above-mentioned testimony of Mr. Veit followed the interesting revelation by him that:

> "I would buy enough of these promotion signs at a high enough price, not only to give a modest increase to Union News but to cancel out the rebate structure which had been established. In other words, I think we should take these display spaces for something like $25,000 a year and stop all rebates. (Veit's July 8, 1960 memo to Bradford GX 12)" T., 207a, lines 2-9.

The history of the law is replete with the doctrine that it is the nature of the thing is question, not the title assigned to it, that determines its true character. This maxim is most appropriate in the instant case as it has been clearly demonstrated that the "promotional" scheme, despite the misnomer, was no more than a continuation of discounts which had existed for decades. As such, we submit that clearly there was no violation of the order. As Goldstein's testimony indicates, the poster idea originated with The Times, and the appellant, realizing its dependence on the discounts of prior years and its rising costs, was forced to acquiesce in order to preserve its profit margin.

The cost differential of the appellant's operations, in rentals, union labor, long hours and high volume, justified the reduced price, no matter what nomenclature might be attached. As a newspaper representative testified at the trial:

> "There was no special consideration. The basis was our belief that the Union newsstands were high cost operations. They were high traffic points.
> They were valuable to us and we recognized that there costs were of a different order than those of ordinary newsstands. They had unionized help with periodic escalation in salaries and it was on that basis that from time to time we granted requests from Union News for increases in the rebate allowance." T., 169a, lines 3-11.

An examination of appellant's Annual Reports, DX G-1 through G-10, 856a-1036a, indicates how drastically its costs had risen over the

years and the severe financial condition which developed, and demonstrates that in order for the appellant to continue its special services and the advantages it provided to the various newspapers, an increase in the discounts was necessary, but never really forthcoming. "Union News is a high cost operation and newspapers give the shortest profit of any item handled on the stands." Memorandum from Veit to Bradford, July 8, 1960, GX 12, 625a.

Representatives of the newspapers clearly recognized the benefits derived by their association with the appellant, and realized that few, if any, other companies could offer such distinct advantages. This fact is amply brought out in the following testimony of Greenberg, General Manager of The New York Post:

> "THE COURT: In reply to your question, you didn't try to determine the economic value of this (i.e., the discounts)?
>
> "THE WITNESS: It was impossible to relate it to dollar value. If considered that the Union News operation was unique in some respects in terms that it relieved our cashier department, for example of handling certain cash receipts from our routemen which otherwise would have been the case if we did not have the receipts slip arrangement with the Union News Company. Also, that it reduced the exposure of our deliverymen to cash.
>
> It also, in a sense, enabled them to expedite their deliveries without having to be concerned with the physical aspect of collecting cash. So it was felt there was some advantages in the Union News arrangement

for collecting copies sold to the Union News Company by The New York Post.

"Q. Didn't you consider that there was some distinct advantages in the Union News arrangement?

"A. Yes, I think I have just enumerated them.

"Q. What is that?

"A. I think I just enumerated them.

"Q. Using the word distinct arrangement.

"A. Yes, distinct advantages.

"Q. What did you mean when you talked about advantages in connection with the actual physical distribution process of the newspapers by not having handled cash?

"THE COURT: I think I understand it. It was more practical to have a bill instead of cash. The cash might disappear somewhere along the line and you didn't have assurance of getting your money.

"THE WITNESS: It's a quicker operation and it relieved you of having the cash on your person.

"MR. ROTH: While I realize your Honor has the point I still want to ask one more question on this subject.

"Q. Isn't it a fact that some of the newspapers had or experienced some large thefts in connection with the cash collections through the routemen?

"A. It is true that there has been routemen who have been held up...." T., 433a, line 16 - 435a, line 9.

There can be no doubt, in light of this testimony, that the newspapers realized the advantages and the necessity of the payments to the appellant. The Government's own witness truly showed that the appellant's extra services fully warranted the payment of discounts.

Despite these realizations, the newspapers, while admitting the benefits derived from appellant's operation, did little, if anything, to compensate appellant for its increased costs. In 1960, the appellant attempted to increase the price of The Times by 2¢, in the limited country areas (outside the New York Metropolitan area), by which some increase would have been realized. The result was not a realization of appellant's contributions to the newspapers but merely a cessation of supplying the appellant with copies of The Times. After this, the appellant was forced to abide by the fixed price. T., 214a-215a, 219a, lines 6-14. As shown by DX E, 8 a, this was the same response and tactics adopted by The Daily News when the appellant approached it with the same suggestion.

The final result of these refusals was the "promotional" scheme which, as previously shown, was nothing more than the historic discount program in disguise. Despite this, the newspapers realized appellant's value to their businesses: "The payments we are already making and have made for several years are, in reality, an acknowledgment of the fact that we recognize his (Henry Garfinkle, then President of Ancorp) costs and the services we receive." Veit's Memorandum of July 8, 1960 to Bradford, GX 12, 625a. We would ask the Court to examine what the

"benefits" were to the appellant that the alleged promotional scheme provided for as far as The Times was concerned. The record shows that after the adoption of the "promotional" scheme, the appellant received $24,000 per year from The Times (T., 316a, line 21 - 317a, line 10) in lieu of the prior discount. Testimony before the Commission revealed that the appellant sold 43,000 daily copies. Mathematically, the result of a 25¢ discount per hundred would be $33,540 per year. Therefore, the "promotional" scheme, rather than benefitting the appellant, damaged it in the amount of $9,540 per year due to a reduction in the discount. Thus, the appellant, due to its increased costs and its utter dependence on the newspapers, was forced to admit that half a loaf is better than none. Effectively, the only people who benefitted from the new arrangement were the newspapers, themselves.

The true "importance" of the advertisements within the context of the entire plan can be seen from the following testimony of William McCollough, President of Ancorp:

> "Q. So the basis of the agreement was the posters sent by The Post to the Union News Company?
>
> "A. The posters were a minute situation in comparison to the price allowance." T., 576a, lines 12-15.

Testimony on pages 577a-578a shows the same to be true of the arrangement with The Wall Street Journal, and Mr. Veit of The Times also gave this impression. T., 179a, line 24 - 180a, line 8. The fact, as previously pointed out, that whether or not the posters were displayed would not affect the amount of payment also reveals the importance which the parties

placed on the posters.

As previously stated, it is the true nature of the arrangement which controls, not the label attached to it. This is especially true in light of the foregoing excerpts from the Trial Transcript in which witnesses for both parties indicated the real nature of the payments. There should be no penalty imposed in such a case as this when the evidence not only fails to prove the liability of the appellant, but goes so far as to vindicate it. In reality, the only thing the appellant is guilty of is mislabeling the payment.

IV. THE APPELLANT DID ATTEMPT TO COMPLY WITH THE CEASE AND DESIST ORDER AND SUCCEEDED IN LIGHT OF THE FACT THAT IT HAD NO TRUE COMPETITORS

As previously stated, there is no evidence or even a suggestion that the appellant failed to comply with the final cease and desist order of the Federal Trade Commission as to comic books, magazines or paperbacks once the order became binding. We submit that such compliance should be considered in assessing whether or not there has been a violation of the order. The record shows that the appellant attempted to comply with the order to the best of its ability. GX 58, 814a-815a, is a memorandum from Henry Garfinkle, then President of Ancorp, to appellant's employees, dated March 8, 1963, informing them of the order and requesting their compliance as of that date. This is evidentiary of appellant's good faith, and when coupled with the fact that the discounts had long been in progress at this stage, without objection by the Commission, laymen could reasonably be led to believe that their activities were in conformity with the order.

The appellant attempted to inform the newspapers of the Commission's order so that they would be aware of the obligation to offer promotional allowances to other newsstands. This is clearly shown by the letter of Herbert Frilen, dated October 24, 1962, DX D, 814a:

> "We would like to take this occasion to mention particularly that any discounts, rebates or promotional allowances for services or facilities which you may offer us should be offered to all of your newsstand customers on proportionately equal terms <u>where they are in competition with our stands</u>. We ask that you bear this

in mind particularly and promptly apprise of any instance in which this may not be applicable.

We will assume that any offers to grant us such discounts, rebates or allowances will constitute a representation by you to us that they are equal or proportionately equal to those offered to newsstands which are competing with us and that this will apply to the continuance in the future of such payments to us.

We suggest that if you have any questions regarding this situation you communicate with your counsel or with the Federal Trade Commission to obtain their views." (Emphasis supplied.)

It is inconceivable that the Government could have expected the appellant to do more than it did as a serious attempt to comply with the Commission's order. The appellant notified its employees of the order after informing the various newspapers that any payments should be similarly offered to appellant's competitors. It is our belief that in light of the letter of October 24, 1962, the newspapers should have taken the initiative of informing any competitors of the appellant (if they existed). This is a reasonable conclusion in that the newspapers were obviously in a better position to know of any similar companies or discount proposals.

With these thoughts in mind, it is crucial to examine whether or not the appellant truly had any competitors to whom similar offers of discounts should have been made. Testimony at Trial revealed that the appellant, due to the services it renders, is unique in its field. T., 377a, lines 16-23. Upon cross-examination of Mr. Greenberg, General Manager of The New York Post, appellant's attorney read excerpts from Greenberg's Commission Testimony:

Then at line 10, page 68:

"Q. So it is my understanding you did not offer any payments to any other dealer for the same type of promotional

advertising services as the Union News rendered?

"A. This is what I mean when I stated it could not be answered yes or no in defense that I read into your statement that it was possible to have gotten the same services from any other dealers similar to those provided by the Union News Company. It is our considered opinion that it was not."

Then the next question is:

"Q. Could you have offered a program which would be proportionately equal where the dealer or other than the Union News could render services to you for which you could pay money?

"A. I would say there is absolutely no reason to have or formulate a program such as that.

"Q. Why is it that you couldn't formulate a program such as that or there would be no reason to?

"A. Yes, among the principal reasons are the fact that the Union News Company by virtue of the fact that it has 180 outlets in very important areas, the depots where the more affluent readers purchases papers was in a position to make a distribution for us to potentially 180 stands. No parallel situation existed with individual newsstands who are generally considered independent proprietors of their separate businesses and could not have made for us a distribution of newsstands to a group of locations.

"Additionally, our own employees - it relieved our own employees of making such a distribution of the posting of stand cards. It was a function that, if we wished to have this posting performed, that our own employees would have had to perform it and would have distracted from their other duties."

Are those statements or answers of yours correct as of now?

"A. Yes." T., 430a, line 11 - 432a, line 7.

The appellant, according to the Commission's order, was prohibited from accepting payments unless they were offered to "competitors." Competitors may be defined as "(p)ersons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival. Continental Securities Co. v. Interborough Rapid Transit Co., D.C.N.Y., 207 F. 467, 470." Black's Law Dictionary (4th Ed.), 356. Clearly when the above testimony is considered with this definition, the only possible conclusion is that the appellant had no true competitors and thus the payments in question, no matter what they were called, were not in violation of the order. Within the New York area, there was no one who could offer the services provided by the appellant or who could logically be considered a "competitor" of the appellant. Thus, it is stretching credulity to believe the Government's claim that a small individual proprietor of an individual newsstand could be construed as a competitor. The above testimony and definition would prohibit such an

interpretation. The only evidence offered by the Government of a supposed competitor is that of Mr. Green of the Eastern Newsstand Corporation who testified that the only competition was for locations and that Eastern and the appellant were "clearly not competitors" as to business. T., 492a, 506a. This fact is strongly supported by appellant's Prospectus, DX F, at 843a-844a, where it is reported that the only competition of the appellant is in the area of securing leases. Such competition is clearly not what was intended by the Commission's order as can be seen from the facts surrounding its issuance. The areas of the Commission's investigation were nation-wide industries where the appellant actually did have competitors. Such is not the case here.

If we examine the situation beyond the New York Metropolitan area, it becomes rather lucid that any competitors which the appellant might have had were offered better discounts than the appellant. Mr. Veit testified that there were such systems in operation in Chicago and Washington. T., 186a, line 17 - 187a, line 5. The truth of the matter is that the Chicago stand received $35 and then $50 per month and all this for only <u>one</u> stand. T., 227a, line 30 - 228a, line 5. There is also evidence of such payments in Mr. Goldstein's testimony. T., 289a-296a. Whether or not these payments were discounts or promotional schemes is hardly the issue. If they were discounts, then they were merely similar to what the appellant was receiving. However, if they were promotional schemes, then no matter what the payments to the appellant were deemed to be, it could not be considered to be in violation of the Commission's order. It is rather obvious, however, that these parties should not be considered competitors in the true sense of the word in that there was no conflict in their businesses.

As previously demonstrated, realistically, no where in the appellant's main area of operation were there any bona fide competitors.

According to the Commission's order, it would be illegal for the appellant to receive payments for "promotional services or facilities... when respondents know or should know" that these payments were not being affirmatively offered to their competitors. In light of the aforementioned letter of Mr. Frilen it is abundantly clear that the appellant had informed the various newspapers of this requirement and no where did the Government even attempt to prove that the appellant knew or should have known that similar proposals had not been offered to its "competitors." In reality, as shown at trial and as pointed out above, the appellant could reasonably have assumed that the newspapers were offering similar proposals to any other companies which might exist, that the services it provided to the newspapers were unique in its field and thus that lacking competitors, the Commission's order was not violated by its receipt of the payments in question.

V. THE FINES IMPOSED UPON THE APPELLANT WERE WITHOUT ANY FOUNDATION WHATSOEVER IN THE RECORD, THUS REQUIRING, AT A MINIMUM, A REMAND ON THIS PHASE

There are various factors which must be considered by a court when assessing penalties for violation of a cease and desist order of the Commission. Compliance with such an order is fraught with difficulties and traps, especially for the layman. American News Co. v. Federal Trade Commission, supra, at 112, dissent by Moore, Circuit Judge. Clearly, the payments received by the appellant in this case served very little more than to reduce its expenses due to various increases in costs. In light of the heavy expenses involved in appellant's business, such payments were expedient, if not absolutely necessary.

Obviously, it was not the newspapers who suffered due to appellant's activities. On the contrary, appellant rendered a service that could not be performed by others at the same cost. Its stands remained open Saturdays, Sundays and holidays, and operated for long hours, thereby serving the public while most newsdealers remained closed. It maintained cover prices benefitting the public, and, of course, the publishers. It furnished good income and conditions to its employees. It incurred heavy costs prescribed by landlords and unions and expended substantial sums for construction and maintenance. Not a customer was damaged, not a newsdealer was injured, and even the publishers admitted that despite the allowances, they were better off as their costs would increase if the appellant did not provide its unique services. T., 205a, lines 21-25.

The injustice of this proceeding is dramatically illustrated by the dollars and cents result. Appellant is accused of, in effect, over-reaching, and cutting corners to obtain excessive payments to which it was not entitled. The fact is that the increase in costs and the lack of ability to meaningfully keep pace with them because of actions such as this were factors substantially contributing to appellant's financial collapse and filing of a Chapter XI petition on March 20, 1973. We are charged with improperly profiting, when the facts show the excess of costs over intake caused the company's financial ruin. This might suggest the stoic attitude of the late entertainer, Joe E. Lewis, who suggested: "Why should I worry about the depression -- I went broke during the boom!" This is not said in jest, but rather to underscore what Judge Bonsal said after testimony had ended:

> "I did have the feeling as I listened to all that testimony that something happened to the Union News that happened to the railroad. They were all riding high, wide and handsome and the railroad went to pot and they probably went to pot too to a certain extent." T., 1073a, lines 18-22.

Despite the realization, fines were imposed which serve no other purpose than to put the appellant in deeper financial difficulties. There is absolutely no cause for this added burden to the appellant, its shareholders or its creditors. We submit that the Court should consider the excessiveness of the penalties in light of the appellant's financial

condition. As stated, the appellant is presently in Chapter XI Bankruptcy proceedings. The audited 1972 statements reveal an operating loss of $16,100,000, a net loss of $36,600,000 for the year and a shareholder deficit of $13,800,000. If such a severe penalty were imposed, the result would be exceedingly damaging, not merely for the appellant. The net result would be that if the penalty remains as is, the creditors and shareholders, although absolutely blameless, would be the parties who would ultimately suffer. Payments to the creditors have been arranged and the appellant is presently nearing a point where it will again become operational. As the Government claims that the fines would have to be paid in full and are entitled to priority, the effect would be to hinder the reorganization as to creditors, damage appellant's shareholders and ultimately force the appellant into Chapter X proceedings. The trial judge realized whom the fines would really damage:

> "I think one thought does occur to me that whatever penalties are covered on one of these things doesn't come out of the pockets of the creditors and shareholders of Ancorp, I suppose." T., 1072a, lines 11-15.

It is rather strange and, in a way, tragic that despite this realization and admission by the trial court such a severe fine was imposed upon the appellant. Precisely what the judge feared is surely to come to pass unless this Court takes the appropriate action.

No injury to the public was ever established by the Government nor could it have been. "Since the evidence is speculative and inconclusive, the Court finds that no harm to the public has been demonstrated." Trial

Court Opinion of District Judge Bonsal, 1056a. In light of this admission and other findings, it was clearly erroneous for the trial court to levy penalties of almost a quarter of a million dollars against the appellant. The Government's position herein, and its similarly harsh penalty request in United States v. Beatrice Foods, 351 F.Supp. 969 (D.C.Minn., 1972) of a $5,000 per diem penalty totalling $565,000 against a corporation having over a billion dollars in revenue, is in sharp contrast to the court's limitation of a fine of $200 per violation, not $5,000 in that case. The appellant in the present case is not in such an enviable fiscal position as Beatrice Foods. Even in the case of United States v. American Greetings Corporation, 168 F.Supp. 45 (N.D.Ohio, E.D., 1958), aff'd, 272 F.2d 945 (1959), where wrongful use of competitors' tradenames and trademarks was made, that court reduced the penalty to $100 per violation although the transgressions of that corporation were of a much more serious nature than those of the present appellant.

As has been demonstrated, there was no harm to the public, and the appellant, acting in good faith, and lacking intent to violate the order, had attempted to comply with it, and is in no way able to pay the excessive penalties which have been levied herein. Such factors must be taken into consideration in levying penalties for violation of a cease and desist order of the Commission. United States v. J.B. Williams Co., Inc., 354 F.Supp. 521 (D.C.N.Y., 1973). "(T)he lack of intention to violate the order may be considered in determining the extent of civil penalties to be imposed." United States v. H.M. Prince Textiles, Inc., 262 F.Supp. 383, 388 (S.D.N.Y., 1967); see: United States v. Vitasafe Corp., 212 F.Supp. 397, 398 (S.D.N.Y., 1962). The appellant has shown that the Government, through

the Federal Trade Commission, should have known of the discount practice due to the Commission's intensive investigation of the appellant's activities over the past fifteen or twenty years. Why no action was taken on this practice at a prior time is beyond our realm of speculation, but this time lag should clearly be taken into consideration in assessing penalties. "The government's failure to speak out against this practice while fully cognizant of it for a period of four years might lead the defendant to believe that the government was not objecting to it, and impels the Court to assess only a nominal penalty." United States v. Vitasafe Corp., supra, at 50, emphasis supplied. If a four year gap should be considered in assessing penalties, clearly a delay of fifteen or twenty years should establish stronger grounds for a reduction of penalties.

In light of these factors and the findings of the trial court, there is no rational basis for a finding that $2,500 per violation for eighty (of the one hundred twenty-two violations found) was proper. The fine is excessive, and the decision of Judge Bonsal is lacking in any basis for such severity, especially when it is rather obvious that none of the factors which, according to the above-cited case law must be considered, were applied by him. As seen from the appellant's Annual Reports, DX G-1 through G-10, 856a-1035a, and from the evidence offered at the trial, appellant's income over the past several years has declined sharply. In light of this fact, the present bankruptcy proceedings and the factors previously mentioned, there is no justification for the nearly quarter of a million dollars in fines assessed in this case. Thus, a remand is called for to determine what amount, if any, should be assessed in penalties. Such a determination should not be arbitrary or capricious, but based on all the relevant factors which have come to light in this case and are underscored by this brief.

The statements of the trial judge clearly reflect the difficulty of assessing penalties in this case, and in lieu of this a remand for determination of penalties is called for:

"I have serious problems on the assessment of penalties."

T., 1065a, lines 21-22.

With this confession in mind, we submit that no factual basis was established for fines of such a severe nature as were imposed in this case. Whether or not such fines should be imposed is not the point of this claim, but if fines are to be imposed, some factual and legal basis should be shown as to the amount of such fines.

Not only are the excessive fines levied by the court highly suspect, but the propriety of the permanent injunction is clearly questionable. Neither 15 U.S.C. sec 45(1) nor 15 U.S.C. sec. 56, as they existed at the time of the alleged violations or at the time of the trial, provided for the issuance of an injunction. The alleged violations of the order have ceased, and there was admittedly no damage to the public. When considering whether or not an injunction should issue due to a violation of a cease and desist order "depends greatly on the dictates of public interest. Protection of the public should be a paramount consideration in determining the propriety of an injunction." United States v. H.M. Prince Textiles, Inc., supra, at 399. As there was admittedly no harm to the public, there would be no public interest served by the imposition of this injunction.

There is absolutely no grounds in the applicable statutes which authorize the granting of an injunction. "the jurisdiction of the District Court under section 5(1) of the Federal Trade Commission Act (15 U.S.C. sec. 45(1)) is not inherently equitable jurisdiction. The District

Court is authorized therein only to award up to $5,000 in civil penalties for each separate violation, or in the event of continuing failure or neglect to obey the Commission's Order up to $5,000 for each day of continued violation. There is no express grant of injunctive power for the purpose of restraining violations of final Orders of the Commission.... Presumably, Congress supposed that the provisions for heavy civil fines, accumulating day by day for continuous violation, would be sufficient to deter...violation of final Cease and Desist Orders." Herbold Laboratories Inc. v. United States, 413 F.2d 342 (9th Cir., 1969).

The instant case is not like that of United States v. Bostic, 336 F.Supp. 1312 (D.C.S.C., 1971), wherein it was found that an injunction should issue due to the defendant's callous disregard of the Commission's order. No such malice is at all indicated on the part of the appellant in the instant case, and when considering that the practice of which the Government complained has ceased, it is readily apparent that no injunction was warranted.

We submit that the Court should consider what the ramifications of an affirmance of the trial court's decision could possibly lead to. The original Federal Trade Commission suit was brought for violation of section 2(d) of the Clayton Act (15 U.S.C. sec. 13(d)) which provides:

> "that it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale

> or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to allow other customers competing in the distribution of such products or commodities."

Should this Court affirm the decision of the District Court, the Government's next move could very well be an action, through the Federal Trade Commission, against the newspapers involved in the instant case for violation of this very same statute. The result would be a multiplicity of litigation and in effect, the spark which might ignite a series of actions whose net result could very well be the destruction of newspaper retailing in the New York Metropolitan area. High costs and low returns have already caused the demise of The New York Mirror, The New York Herald Tribune, The New York Journal-American and The New York World-Telegram and Sun. This was accomplished without Government intervention, and if such intervention were forthcoming, the result would be the additional expense of litigation compounding the already serious financial world of the newspapers.

Such a result is well within the realm of possibility if this decision were affirmed. Rather than favoring free enterprise, the result would be a serious blow to the newspapers of the entire country as their already narrow margin of profit would be again decreased. The flimsiness of the instant case should clearly warrant a reversal to prevent the establishment of such a dangerous precedent which could lead to the end of this field.

If services, as those provided by the appellant, were erased, the costs of distribution for the newspapers would be prohibitive and eventually

affect the newspapers themselves. The result to the appellant since the cessation of these discounts has already come to light as can be seen by the appellant's Chapter XI proceedings. Eventually, the higher costs must reach the newspapers themselves, resulting in either an increase in the retail price of newspapers or a decrease in profits. How long will it be before the other papers are faced with the same necessity as that of The New York Post which has doubled its newsstand price over the past few years? It is within the province of this Court to prevent such a disaster to an industry which has long been recognized as a bulwark of American society. No purpose would be served by an affirmance of the trial court's decision other than to seriously undermine the entire industry.

CONCLUSION

As has been demonstrated above, the Government has failed to comply with the rigid statutory procedures for instituting a suit of the present type. Serious questions have been raised as to whether the final cease and desist order was even intended by the Commission to control anything other than the three areas which led to its issuance. The appellant has shown that it has no competitors in the true sense of the word and has done everything within its power to comply with the order.

Apart from this, there was no evidentiary basis for the imposition of the severe fines in light of all the factors hereinbefore mentioned and absolutely no authority for the issuance of an injunction. The dangerous precedent which an affirmance of this decision would set has clearly been shown.

These factors strongly militate for a reversal of the District Court decision, and if not that, then, at a minimum, a reduction in the fines and the vacating of the injunction, or a hearing to determing these matters and amounts on a factual basis.

Respectfully submitted,
SAXE, BACON, BOLAN & MANLEY
Attorneys for Appellant, and
Special Counsel by designation
of the Bankruptcy Judge

ROY M. COHN
Of Counsel

(3)

COPY RECEIVED
Paul J. Curran
UNITED STATES ATTORNEY
8/30/74